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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

NO. [redacted] 97

CHARLES BUSSIE,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

(On Petition for Writ of Certiorari to the Supreme Court of Illinois)

BRIEF FOR RESPONDENT IN OPPOSITION

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OCTOBER TERM, 1968

NO. 1353

CHARLES BUSSIE,

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vs.

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Respondent.

(On Petition for Writ of Certiorari to the Supreme Court of Illinois)

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Illinois Supreme Court is reported at 41 Ill. 2d 323, 243 N.E. 2d 196.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Does the admission of illegally seized evidence, which later caused reversal of the conviction on one indictment, substantially prejudice a defendant's trial on a separate and distinct indictment, where the indictments were consolidated for trial without objection by the defendant?

CONSTITUTIONAL PROVISIONS

The Constitutional provisions involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

The following is an addendum to Petitioner's Statement of the Case:

In June of 1965, the Petitioner, Charles Bussie, was indicted under two indictments by the Cook County Grand Jury, charging him with unlawful sale and unlawful possession of narcotic drugs. Petitioner's pre-trial motion to suppress evidence alleged to have been illegally seized was denied (A. 16).*

Thereafter the trial court consolidated the sale and possession charges for trial (A. 17). Petitioner's counsel stated that he had no objection to the consolidation (A. 17). The consolidation was ordered, and Petitioner was tried by a jury.

At trial, the alleged illegally seized evidence was admitted and used against Petitioner on the indictment charging unlawful possession of a narcotic drug. Relating

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*"A" refers to Petitioner's Illinois Supreme Court Abstract.

to the seizure of the narcotics, the court gave the following instructions:

> "The court instructs the jury that the right of a person to be secure in their persons and houses against unreasonable searches and seizures cannot be violated by state officers; and the home of a person charged with or suspected of committing a crime cannot, without consent, be searched without a warrant, unless such search is incident to a lawful arrest." (Petitioner Bussie's given Instruction No. 17, A. 46).
>
> * * *
>
> "The court instructs the jury that necessary force may be used to enter a dwelling unit when a State officer reasonably believes that entry to such dwelling unit is necessary to arrest a person whom he reasonably believes has committed a crime; to prevent such person from escaping; to discover the fruits of the crime or articles which may constitute evidence of an offense." (State's given Instruction No. 12, A. 46).

Petitioner did not request that the jury be instructed to consider each indictment and the evidence relating to it separately.

Petitioner was found guilty on each indictment and sentenced to a term of ten to twelve years for the unlawful sale and two to five years for the unlawful possession, the sentences to run concurrently.

After careful scrutiny of the record, the Illinois Supreme Court reversed the conviction as to the unlawful possession of a narcotic drug, and, with separate consideration, affirmed the conviction for unlawful sale. The Supreme Court ruled that the trial court had erred in its denial of the motion to suppress and consequently held that petitioner's conviction for unlawful possession could not stand.

Concerning the conviction for unlawful sale, the Court was asked to review the propriety of the following instruction:

> "The Court instructs the jury that anyone who agrees, concerts, or in any manner offers to unlawfully sell or dispense narcotic drugs to any person or negotiates to have any narcotic drug unlawfully sold, dispensed, or given commits the offense of sale of a narcotic drug." (State's given Instruction No. 13).

The Court ruled:

> "Such and instruction mis-states the law and would lead the jury to conclude that a person had committed the offense of sale of a narcotic drug even though an exchange or sale never took place. Our examination of the evidence, however, clearly indicates that a sale did take place and that the jury could reasonably have determined that the defendant was the seller. Based upon this evidence, therefore, we find that this instruction resulted in no substantial prejudice to the defendant."

The Court affirmed the sale conviction. Petition for rehearing was denied.

REASONS FOR DENYING THE WRIT

I.

PETITIONER WAS PROVEN GUILTY OF UNLAWFUL SALE OF NARCOTICS SOLELY ON THE BASIS OF CONSTITUTIONALLY ADMISSIBLE EVIDENCE, AND NO COMBINATION OF HARMLESS ERRORS OR IMPROPERLY ADMITTED EVIDENCE ON ANOTHER INDICTMENT COULD HAVE AFFECTED THE DECISION.

Petitioner, in this cause, is relying on precisely the same errors he alleged in seeking reversal in the Illinois Supreme Court. They are "the erroneous instruction of the trial court as to the unlawful sale of narcotic drugs, coupled with the trial court's admission of the illegally seized marijuana . . ." (Pet. 5)

Petitioner analogies these errors to an anvil around the leg of a swimmer. But it should be clear that due to the different proof on the two distinct charges, the error was weightless as to the conviction for sale of narcotics. This was so decided by the Illinois Supreme Court.

The issue here is whether Petitioner's guilt was established on the basis of the constitutionally admissible evidence. Petitioner was convicted of unlawful sale of narcotics pursuant to Illinois Revised Statutes, Chapter 38, sec. 22-3 (1967). The proof of the unlawful sale was established by the testimony of a police informant who had made the purchase from Petitioner. The informant had been searched at the police station before the "controlled sale" (A. 18), and given $300.00 in pre-recorded funds (A. 18). He testified to driving with another informant and a co-defendant to the address of the Petitioner. He and the

co-defendant were admitted to the apartment of the Petitioner. $300.00 was turned over to the Petitioner in exchange for 1¾ pounds of marijuana (A. 18). With a prearranged signal as they left the apartment, the informant notified surveiling police that the sale had been consummated (A. 21). After the sale, the informant and the co-defendant were searched and a bag of narcotics was found, but no money. The informant went back to the apartment with the police and showed them the location of Petitioner's apartment (A. 21). He then returned to the police station (A. 21), whereupon he immediately returned to the apartment to identify the suspect arrested by the police as none other than the Petitioner, Charles Bussie (A. 22). At the time of his arrest, Bussie was carrying a portion of the marked money on his person (A. 13-14).

It has been held many times that the testimony of a police informant who bought narcotics in a "controlled buy" was sufficient to convict a defendant of a narcotic offense. *People* v. *Merriweather,* 67 Ill. App. 2d 221, 214 N.E. 2d 593 (1966); *People* v. *Williams,* 87 Ill. App. 2d 338, 231 N.E. 2d 646 (1967). This is so even where the "buy" was made out of the vision of the police, but where an immediate arrest was made and the defendant found in possession of marked money. *People* v. *Frank,* 51 Ill. App. 2d 251, 201 N.E. 2d 197 (1964). In other words, the error in the lower court does not alter the fact that Petitioner was found guilty by competent evidence. *Sinclair* v. *United States,* 279 U.S. 263 (1929). In *United States* v. *Johnson,* 383 U.S. 169, 188 (1966) (concurring opinion), this Court noted that there are many cases where an erroneous conviction on one count does not vitiate a conviction on other counts, especially where concurrent sentences are involved, citing *United States* v. *Romano,* 382 U.S. 136 (1965); *United States* v. *Gainey,* 380 U.S. 63 (1965); *Barnard* v. *United States,* 342 F. 2d 309 (9th Cir. 1965). The Court

further noted that there are numerous cases where the issue was raised and *certiorari* denied.

In the present case the indictment for unlawful sale and the indictment for unlawful possession are so distinct that had one been defective the other would have been unaffected. The judgment as to one count might be reversed and the other affirmed. *DeJiane* v. *United States,* 282 F. 737 (3rd Cir. 1922); *United States* v. *Tuffanelli,* 138 F. 2d 981 (7th Cir. 1943).*

In the case at hand there is no indication that any evidence relating to the possession charge was used to convict for unlawful sale. For illegally seized evidence introduced at trial to deprive one of due process, there must be a showing that the challenged evidence contributed to the conviction *U.S. ex rel. Smith* v. *Nelson,* 275 F. Supp. 261 (N.D. Cal. 1967). A bold assertion of prejudice is not enough. *People* v. *Kemp,* 359 P. 2d 913 (Cal. 1961). In the *Kemp* case the appellant asserted that the jury must have been influenced by the evidence on a rape charge as it considered a murder charge. The Court rejected that argument and ruled that the mere assertion of that fact does not prove it. Petitioner here says "none can say what weight the court's erroneous ruling . . . bore in the minds of the jury in its determination of guilt" (Pet. 6). That is not so. It was clear to the Illinois Supreme Court that the illegally seized evidence substantially contributed to the conviction for unlawful possession. Hence, the reversal. But it was equally clear to the Court that the sale conviction was based on the testimony of the State witnesses; and the Petitioner has demonstrated no possible reason why the jury

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*See also: *People v. Freitag,* 336 Ill. 286, 168 N.E. 332 (1929); *People* v. *Brush,* 324 Ill. 261, 155 N.E. 34 (1927); *People* v. *Holton,* 326 Ill. 481, 158 N.E. 134 (1927).

would need or use anything other than the evidence of unlawful sale to convict for unlawful sale. Respondent contends, and it appears obvious, that the Supreme Court of Illinois was convinced, as it reviewed the record, that the conviction for unlawful sale was based on the testimony of the police informant-purchaser.

Finally, Petitioner argues that the prejudicial error which vitiated the possession conviction must be taken together with the harmless error in instructing the jury on the sale charge, and that the combined error must result in the reversal of the sale conviction. As pointed out above, there has been no showing by Petitioner how the erroneous possession conviction related to the separately proven unlawful sale. Therefore, Petitioner's efforts to "consolidate" error must necessarily fail. Further, his reliance on *Gordon* v. *United States*, 344 U.S. 414 (1953), misses the mark. There this Court held that the trial court erred in denying the request for production of certain documents and a transcript of prior proceedings, both documents to be used by the defense in an effort to impeach the same government witness. *Gordon* is factually inapposite to the case at bar.

Petitioner also relies on *United States* v. *Stevenson*, — F. 2d — (No. 16894, 7th Cir. 1969). There illegal evidence was admitted on one count of a three count indictment, all three counts having been consolidated for trial. The Court of Appeals reviewed the entire record and concluded that while they would normally sustain the convictions on the other two counts, the record demonstrated a high probability that Stevenson was prejudiced on all counts by the illegally admitted evidence. Having had no opportunity to review that record, Respondent would certainly not venture an opinion as to the propriety of the *Steven-*

son decision. However, we would point out that the *Stevenson* Court did not set down a general proposition of law, nor were they reviewing the record in *this* case. The Illinois Supreme Court, reviewing the entire record in *this* case, concluded that the inadmissible evidence had no effect on the unlawful sale conviction. The independent evidence supporting the sale conviction here is clearly set forth in the record and in the Supreme Court's opinion. That being the case, the *Stevenson* decision can hardly be said to control here.

II.

IN A TRIAL WHERE CONSOLIDATION OF TWO INDICTMENTS WAS PROPER AND WHERE COUNSEL FOR DEFENDANT EXPRESSES SATISFACTION WITH CONSOLIDATION, AND OFFERS NO JURY INSTRUCTION CONCERNING CONSOLIDATION, THE DEFENDANT CANNOT BE HEARD TO SAY THAT THE CONSOLIDATION WAS PREJUDICIAL.

Petitioner's actual reason for requesting this Court to grant a Writ of Certiorari is the prejudice allegedly caused by the consolidation of the indictments. As evidenced by the Petitioner's pre-trial motion to suppress, the threat of prejudice was known to Petitioner at the time of consolidation. Yet he did not object to consolidation, an "error" he evidently felt was non-existent throughout the trial and in all appeals heretofore. This attack on the effects of consolidation, made for the first time in this Court ,cannot be sustained.

The consolidation was proper. Chapter 38, sec. 114-7 of the Illinois Revised Statutes (1967) states "the court may

order 2 or more charges to be tried together if the offenses and the defendant could have been joined under a single charge." Section 111-4 of Chapter 38 further provides that "Two or more offenses may be charged in the same indictment . . . if the offenses charged . . . are based on the same act or on 2 or more acts which are part of the same comprehensive transaction." The facts in this case indicate clearly that both offenses charged arose out of the "same comprehensive transaction." See: *People* v. *Jennings*, 84 Ill. App. 2d 33, 228 N.E. 2d 566 (1967). Hence there was no error in trying the Petitioner on two separate indictments at the same time where the Petitioner acquiesed in the consolidation of the indictments.

The record exhibits clearly what occurred at the time of consolidation:

> The Court: Is Mr. Bussie objecting to the consolidation?
>
> Mr. Tucker: I have no objection.
>
> The Court: He doesn't want to be tried twice in case he should be freed on the one . . . . (A. 17)

Absent an objection at the outset, the trial court acted properly in consolidating the indictments. Had defense counsel felt that the ends of justice would not be served by consolidation, it was incumbent upon him to resist joinder. He did not do so for reasons which were obviously tactical. He and his client did not desire to run the gauntlet of two separate trials. Their failure to object has repeatedly been held to constitute waiver and bar an attack on consolidation at the appellate level. See *Willis* v. *United States*, 271 F. 2d 477 (D. C. Cir. 1959), where the Court of Appeals stated:

> "At the beginning of the trial the judge could not possibly have foretold that consolidation might eventual-

> ly and erroneously prejudice appellant; only his defense counsel could then have possibly known. Absent an objection at the outset the trial court acted properly in permitting consolidation. The time-saving factor could not be allowed to override the interests of justice if a timely objection had been made, but there was no ocasion to reject the consolidation since trial counsel did not suggest that defendant would be harmed thereby. Appellant cannot now be heard to argue, for the first time, that consolidation was erroneous and prejudicial." 271 F. 2d at 479.

See also: *Peope v. Irvin,* 264 ACA 881, 70 Cal. Rptr. 892 (1968); *People v. Dugan,* 254 Cal. App. 2d 402, 62 Cal. Rptr. 185 (1967); *Ryan* v. *State,* 197 So. 2d 37 (Fla. App. 1967); *State* v. *Baker,* 49 N.J. 103, 228 A. 2d 339 (1967).

Illinois follows the general rule set out in the cases cited above. In *People v. Jennings, supra,* the Court held that where there was no indication that the defendant opposed going to trial on consolidated charges, the failure to object barred review of that question.* The *Jennings* case represents what has always been the law in Illinois concerning consolidation and severance, *People* v. *Woods,* 23 Ill. 2d 471, 179 N.E. 2d 11 (1961), *cert. den.* 370 U.S. 910 (1962); *People v. Williams,* 30 Ill. 2d 166, 195 N.E. 2d (1964); *People v. Levin,* 292 Ill. App. 413, 11 N.E. 2d 224 (1937); *People v. Raymond,* 393 Ill. 147, 63 N.E. 2d 341 (1946).

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*The Court also held that failure of the trial judge to instruct the jury that evidence presented with respect to one of the indictments should not be considered as influencing or controlling with respect to the other indictment was not error where, as here, the defendant offered no instruction relating to the separate indictment. 228 N.E. 2d at 572.

Not only did the Petitioner acquiese in consolidation of the indictments for trial, he never requested that the court instruct the jury to consider the evidence and the consolidated indictments separately. Having never offered such an instruction, he cannot now, for the first time, assign error to the trial courts failure to so instruct. *Willis* v. *United States, supra; People v. Jennings, supra; People v. Rave,* 364 Ill. 72, 3 N.E. 2d 972 (1936).*

This Court is being urged to adopt the unlikely rule that an appellate court must look not only at what occurred but how the court could improve on petitioner's defense. The absurdity of such a contention was noted by Chief Judge Prettyman in *Mitchell* v. *United States,* 259 F. 2d 787 at 793 (D. C. Cir. 1958):

> "It is no part of the judge's function to evaluate the relative efficacy of trial actics. If a trial judge were to understand that after the trial he would in all probability be called upon to determine whether each or any of the trial steps taken by the defense was or was not 'ineffective' his whole attitude toward the conduct of the trial would change. We think this would destroy the concept of an impartial judge, a concept basic to our system."

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*See also: *State* v. *Booth,* 449 P. 2d 107 Wash. 1968); *People* v. *Anderson,* 163 N.E. 2d 793 (Mich. App. 1968); *State* v. *Franklin,* 163 N.W. 2d 437 (Ia. 1968); *State* v. *Lewis,* 165 N.W. 2d 569 (Neb. 1969); *State* v. *Counterman,* 448 P. 2d 96 (Ariz. App. 1968); *Pearsall* v. *State,* 215 So. 2d 58 (Fla. App. 1968).

CONCLUSION

For the reasons set forth above, Respondent requests that the Petition for Writ of Certiorari to the Supreme Court of Illinois be denied.

Respectfully submitted,

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